(but no lower than $100 and no higher than $1000), reasonable attorneys' fees and costs, exemplary damages for intentional or willful conduct, and equitable relief. CC §1812.636(a).

X. CONSUMER WARRANTIES

A. Song-Beverly Consumer Warranty Act (CC §§1790–1795.7)

1. [§5.103] Scope of Act

The Song-Beverly Consumer Warranty Act (CC §§1790–1795.7) establishes implied warranties of merchantability and fitness on all new consumer goods sold at retail. CC §§1792–1792.2. It imposes strict requirements for the waiver of these warranties and prohibits a waiver in certain situations. CC §§1792.3–1793. The Act also imposes a duty on those who install, service, or repair new or used consumer goods to do so in a good and workmanlike manner. CC §§1796–1796.5.

In assessing whether the Song-Beverly Act applies, the court must inquire whether: (1) the plaintiff is a buyer of goods, and (2) the goods purchased are consumer goods. *Atkinson v Elk Corp.* (2003) 109 CA4th 739, 749, 135 CR2d 433. In this case, the court held that roofing shingles are not consumer goods under CC §1794(a) because they are neither removable nor repairable without damage. *Atkinson v Elk Corp., supra,* 109 CA4th at 757.

Under CC §1795.4, leases of consumer goods (defined in CC §1791(g)) that exceed four months are subject to the Act. The manufacturer has the same responsibility to the lessee that it has to buyers. CC §1795.4(b). The lessor has the same responsibilities to the buyer that a seller would have, if the lessor leases from the lessor's own inventory; ''inventory'' includes goods ordered from another when ''the lessor is a dealer in goods of that type.'' CC §1795.4(c). If the lessor is not leasing from his or her own inventory and has acquired the goods from a third person in order to lease them to the consumer, that third person has the same responsibilities to the buyer that a seller would have in a sale. CC §1795.4(d).

The Act should be used as a complement to the Commercial Code (see §5.110), but the provisions of the Act prevail over the provisions of the Commercial Code when they conflict. CC §1790.3.

Sales of new or used ''assistive devices'' (defined in CC §1791) for use by a physically handicapped person must be accompanied by a written warranty. CC §1793.02(a). Assistive devices must be specifically fit for the particular needs of the ultimate user. CC §1793.02(a), (d).

The sale or lease of any wheelchair that was paid for in whole or in part

by Medi-Cal must be accompanied by an express written warranty by the manufacturer or lessor stating that the wheelchair is free of defects. CC §1793.025(a). The duration of the warranty must be for at least 60 days for a used wheelchair and one year for a new wheelchair from the date of the first delivery to the consumer. CC §1793.025(a).

The seller may sell a service contract to the buyer in addition to or in lieu of an express warranty if that contract fully and conspicuously discloses in simple and readily understood language the terms, conditions, and exclusions of the contract. CC §1794.4(a). Civil Code §1794.41 regulates the sale of motor vehicle, home appliance, and home electronic product service contracts. Such a contract must contain certain disclosures, must be available for inspection by the buyer before purchase and then delivered to the buyer, and must be cancelable under certain conditions. Detailed requirements for new or used home appliance and home electronic product service contracts are set forth in CC §1794.4(b)–(d).

The implied warranties provided by the Act do not apply to clothing or consumables (CC §1791(c)–(d)) or used consumer goods that are sold without an express warranty (CC §1795.5). CC §1791(a). Goods sold through telephone orders taken out of state and shipped at the buyers expense also are not covered because title passes to the buyer when the goods are shipped from the other state, not when they are delivered in California. *California State Elec. Ass'n v Zeos Int'l Ltd.* (1996) 41 CA4th 1270, 1277, 49 CR2d 127. In these instances, relief may be available under the Commercial Code (see §5.114).

Although used consumer goods are not expressly covered under the Act, a written service contract that is sold in conjunction with the sale of a used consumer item qualifies as an express warranty under the Act and thus affords the purchaser with a remedy under the Act (see CC §1795.5). *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 1158, 67 CR2d 543.

2. [§5.104] Implied Warranties; Disclaimer

The implied warranties of merchantability and fitness are defined in CC §1791.1. Every sale of new consumer goods, unless properly disclaimed, is accompanied by these warranties from both the manufacturer and the retail seller. CC §§1792–1792.2. However, the implied warranty of fitness for a particular purpose applies only if the manufacturer, seller, or both have reason to know that the goods are required for a particular purpose and that the buyer is relying on their skill and judgment. CC §§1792.1–1792.2. These warranties must have a duration period that is the same as any express warranty given, but not less than 60 days or more than one year. CC §1791.1(c).

To avoid the implied warranties imposed by this Act, the goods must be sold on an ''as is'' or ''with all faults'' basis. CC §1792.3. If the goods sold on an ''as is'' or ''with all faults'' basis bear a conspicuous notice advising the buyer of the risks involved, the warranties may be disclaimed. CC §§1792.4–1792.5. However, these notices must be attached to the goods to be effective. The judge should insist that the notice be produced and determine that it meets all the statutory requirements, especially that it is phrased in simple and concise language. See CC §1792.4.

The provisions authorizing disclaimers of implied warranties (CC §§1792.3–1792.5) do not apply to sales of used ''consumer goods'' (defined as products, other than clothing or consumables, that are used, leased, or purchased for personal, family, or household purposes) that are not accompanied by an express warranty. This is because the Act itself does not apply to these transactions, except those for used assistive devices. The legal effect of a purported disclaimer of implied warranties in a sale of used consumer goods must be determined by reference to the provisions of the Commercial Code. See §§5.110–5.114.

In the case of sales of used goods that have an express warranty, the implied warranties of merchantability and fitness attach by operation of law and must apply for the length of any express warranty given, but not less than 30 days nor more than three months. CC §1795.5.

3. [§5.105] Express Warranties

The seller or manufacturer may make express warranties, but may not then limit, modify, or disclaim implied warranties. CC §1793. If express warranties are made, they must be fully set forth in simple and readily understood language that must clearly identify the party making the express warranty, and conform to the federal standards for disclosure of warranty terms and conditions set forth in the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (15 USC §§2301–2312) and in the regulations of the Federal Trade Commission adopted under the Act. CC §1793.1. The statute of limitations for a faulty product is not extended under the ''future performance'' exception to the UCC (see Com C §2725) by the manufacturer's general assertions that the product is long-lasting. *Carrau v Marvin Lumber & Cedar Co.* (2001) 93 CA4th 281, 290–292, 112 CR2d 869 (court did not decide whether these assertions amounted to an express warranty, because action was time-barred in any case).

Manufacturers must maintain or designate sufficient authorized service and repair facilities reasonably close to all areas where their consumer goods are sold to carry out the terms of such warranties. CC §1793.2. They must also make available to authorized service and repair facilities suf-

ficient service literature and replacement parts to make repairs during the express warranty period. CC §1793.2(a).

Warrantors must also inform buyers of the name and address of their service and repair facilities. This can be done by a warrantor providing a list of the names and addresses of the facilities at the time of sale (CC §1793.1(e)(1)), or providing the buyer with the name, address, and telephone number of a central directory or a toll-free telephone number that has this information (CC §1793.1(e)(2)), or by maintaining a list of its repair facilities at the premises of all retailers that offer its products in California (CC §1793.1(e)(3)). Requirements are also imposed with respect to warranty or product registration cards or forms, including electronic on-line warranty or product registration forms. CC §1793.1(a)–(d).

A service contract is not an express warranty under the Song-Beverly Consumer Warranty Act and therefore does not entitle the consumer to the replacement/reimbursement remedy of CC §1793.2(d)(2). *Gavaldon v DaimlerChrysler Corp.* (2004) 32 C4th 1246, 1261, 13 CR3d 793.

4. [§5.106] Relief Available

In the case of express warranties, the buyer has the following remedies:

- If the goods are defective, they may be submitted for repair and if they cannot be repaired after a reasonable number of attempts, the buyer must receive a replacement or refund, in most cases within 30 days. CC §1793.2(b)–(d). In particular, a manufacturer who does not service or repair the goods after a reasonable number of attempts must reimburse the purchase price less the amount attributed to the buyer's use before discovery of the defect. CC §1793.2(d)(1). The buyer has a right to choose whether to receive a replacement or a refund; the manufacturer cannot force the buyer to accept a replacement. *Music Acceptance Corp. v Loring* (1995) 32 CA4th 610, 620–621, 39 CR2d 159.
- If the goods cannot be repaired or serviced because of the method of installation or because they have become affixed to real property, the manufacturer must either replace the goods or reimburse the buyer. CC §1793.2(e)(1).
- A seller or manufacturer who fails to maintain service facilities, or does not make available to authorized service and repair facilities service literature and replacement parts sufficient to make repairs during the express warranty period, must make arrangements for repair, replace the goods, or make a refund to the buyer. CC §1793.3.
- If a manufacturer, retailer, or other warrantor violates the warranty or

> any provision of the Song-Beverly Consumer Warranty Act (CC §§1790–1795.7) or any service contract, the buyer may recover actual damages and other legal and equitable relief without a showing that the violation was ''willful.'' CC §1794(a). If the seller or manufacturer willfully violates the warranty, the buyer may also recover a civil penalty not to exceed two times the amount of actual damages. CC §1794(c). A buyer prevailing in any action under the section *shall* be allowed to recover costs and expenses, including attorneys' fees. CC §1794(d).

Civil Code §1790.4 provides that the remedies provided under the Act are cumulative and are not to be construed as restricting any remedy that is otherwise available. However, the court in *Troensegaard v Silvercrest Indus., Inc.* (1985) 175 CA3d 218, 220 CR 712, held that a plaintiff could not recover both the civil penalty under CC §1794(c) and punitive damages under CC §3294 for the same willful, oppressive, and malicious acts. Similarly, the court in *Gomez v Volkswagen of Am., Inc.* (1985) 169 CA3d 921, 215 CR 507, held that a plaintiff with a cause of action under the Act is limited to the remedies under CC §1794 and may not seek a tort measure of damages, including punitive damages, for breach of the covenant of good faith and fair dealing in a written warranty. Nor may emotional distress and loss of use damages be awarded for a finding of willful violation of the Act. *Bishop v Hyundai Motor Am.* (1996) 44 C4th 750, 757–758, 52 CR2d 134.

A buyer may recover civil penalties from a car manufacturer for a willful violation of the Act even if the manufacturer maintains a qualified third party dispute resolution process under the statute. *Jernigan v Ford Motor Co.* (1994) 24 CA4th 488, 489, 29 CR2d 348. It is not necessary for the buyer to formally reject or revoke acceptance of the vehicle, after discovering defects, in order to establish a breach of warranty under the Act. *Krotin v Porsche Cars N. Am., Inc.* (1995) 38 CA4th 294, 297, 45 CR2d 10.

The discretionary civil penalty of CC §1794(c), which is available to buyers in the event a seller or manufacturer willfully violates an express warranty under the Act, is governed by a four-year statute of limitations. *Jensen v BMW of N. Am., Inc.* (1995) 35 CA4th 112, 133, 41 CR2d 295. See UCC §2–725. A buyer prevailing under this section is also entitled to recover expenses for expert witness fees provided they were reasonably incurred by the buyer in connection with the commencement of the action. CC §1794(d); *Jensen v BMW of N. Am., Inc., supra,* 35 CA4th at 138.

In an action involving a new motor vehicle, the court may award civil penalties under CC §1794(e) even when the violation was not willful (*Suman v BMW of N. Am., Inc.* (1994) 23 CA4th 1, 28 CR2d 133), unless the manufacturer maintains a qualified dispute resolution process. *Jernigan v Ford Motor Co., supra,* 24 CA4th at 493.

Prevailing *defendants* are permitted to recover costs under the Act. *Murillo v Fleetwood Enterprises, Inc.* (1998) 17 C4th 985, 999, 73 CR2d 682 (overruling *Brown v West Covina Toyota* (1994) 26 CA4th 555, 561, 32 CR2d 85, on this point). In addition, sellers are permitted to recover expert witness fees under CC §998 in a Song-Beverly Act case. *Murillo v Fleetwood Enterprises, Inc, supra,* 17 C4th at 1001. In recovering costs and fees under the Act, a buyer has the burden of showing that the fees incurred were allowable, reasonably necessary, and reasonable in amount. *Levy v Toyota Motor Sales, U.S.A., Inc.* (1992) 4 CA4th 807, 816, 5 CR2d 770. Attorneys' fees on behalf of a prevailing buyer under the Act are recoverable only for legal expenses actually incurred. *Nightingale v Hyundai Motor Am.* (1994) 31 CA4th 99, 103–104, 37 CR2d 149 (defendant not liable for attorney's usual hourly rate if attorney bills client at lower rate).

In the case of implied warranties, the buyer may recover the remedies authorized by Com C §§2601–2616 and 2701–2725. CC §§1791.1(d), 1794(b). The buyer may

- Retain the goods and recover damages, including the cost of repairs. Com C §§2714–2715.
- Reject the goods, cancel the contract, and recover the purchase price plus incidental and consequential damages. Com C §§2711–2713.
- Recover costs and attorneys' fees. CC §1794(d).

A class of consumer plaintiffs may not be certified in an action for breach of implied warranty under the Act when most of the products sold to would-be class members did not contain the defect complained of. *American Suzuki Motor Corp. v Superior Court* (1995) 37 CA4th 1291, 1298–1299, 44 CR2d 526.

On the tolling and execution of the period of warranties, see CC §§1795.6–1795.7.

B. Tanner Consumer Protection Act (''Lemon Law''; CC §1793.22)

1. [§5.107] Scope of Act

The Tanner Consumer Protection Act establishes terms and procedures under which a manufacturer who is unable to service or repair a new motor vehicle to conform to the applicable express warranties after a reasonable number of attempts must either replace the vehicle or make restitution to the buyer, at the buyer's election. CC §1793.22. In the past, provisions of the Act were commonly referred to as the ''lemon law.''

Application of the Tanner Consumer Protection Act is restricted to new

motor vehicles, as defined in CC §1793.22(e), that are used or bought primarily for personal, family, business, or household use. CC §1793.22(e)(2). In the case of a ''motorhome,'' as defined in CC §1793.22(e)(3), that portion of the unit which is devoted to propulsion and is not designed or used primarily for human habitation is included in the definition of new motor vehicles. CC §1793.22(e)(2). Cars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within the definition of ''new motor vehicle'' under CC §1793.22. *Jensen v BMW of N. Am., Inc.* (1995) 35 CA4th 112, 123, 41 CR2d 295.

In transactions involving the sale of new motor vehicles, the statute creates a rebuttable presumption established by the Act that a reasonable number of attempts have been made to conform the vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles, whichever comes first, (1) the problem results in a condition likely to cause death or serious bodily harm, repair has been attempted at least twice, and the buyer has notified the manufacturer of the problem; (2) the vehicle has been subject to repair at least four times for the same nonconformity and the buyer has notified the manufacturer of the problem at least once; or (3) the vehicle has been out of service because of repairs of nonconformities for more than 30 days since delivery, unless the repairs cannot be made because of conditions beyond the manufacturer's control. CC §1793.22(b). Under CC §1793.2(d)(2), the manufacturer and dealer must be given a number of attempts to repair a vehicle; one attempt is insufficient. *Silvio v Ford Motor Co.* (2003) 109 CA4th 1205, 1208, 135 CR2d 846.

The rebuttable presumption may be asserted by the buyer in any civil action, including an action in small claims court or other formal or informal proceedings. CC §1793.22(b). The manufacturer may require a third party dispute resolution process that complies with Federal Trade Commission requirements, which the buyer must then first resort to before filing a court action if the buyer wishes to use this presumption. CC §1793.22(c). Buyers rarely seek to trigger this presumption but, if they do, they are not bound by the results of the dispute resolution process. CC §1793.22(c).

2. [§5.108] Relief Available

A buyer who establishes a violation of CC §1793.2(d)(2), requiring a manufacturer to service or repair a new motor vehicle to conform to express warranties within a reasonable number of attempts, is entitled to recover damages and reasonable attorneys' fees and costs, and may recover a civil penalty of up to two times the amount of damages. CC §1794(e). However, the manufacturer is not liable for any civil penalty under CC §1794(e)

under the following circumstances: (1) if the manufacturer maintains a qualified third party dispute resolution process that substantially complies with CC §1793.22; (2) if the buyer fails to serve on the manufacturer a written notice requesting compliance with CC §1793.2(d)(2); (3) if the buyer serves such notice and the manufacturer complies within 30 days; or (4) if the buyer recovers a civil penalty under CC §1794(c) for the same violation.

The buyer of a new motor vehicle may recover paid finance charges from the manufacturer when using the statute's refund remedy despite the absence of express language to that effect in CC §1793.2(d)(2)(B); it is reasonable to assume that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute. *Mitchell v Blue Bird Body Co.* (2000) 80 CA4th 32, 37, 95 CR2d 81.

Under CC §1793.22, neither 30 days in the shop nor four unsuccessful attempts to repair a problem (including repair efforts by the *dealer* or other agent of the manufacturer) conclusively proves that the car owner is entitled to the replacement or reimbursement remedy set out in CC §1793.2(d). The 30 days/four attempts standards are only guidelines for the trier of fact to consider. Once the standards are met, however, the burden shifts to the manufacturer to prove that the repairs could not be performed because of conditions beyond its control or that of its agents. *Ibrahim v Ford Motor Co.* (1989) 214 CA3d 878, 263 CR 64. Even if a car mechanic spends some of the repair sessions trying to *diagnose* the problem, rather than attempting to fix it, these sessions count as failed repair attempts for the purpose of the Song-Beverly Act. *Oregel v American Isuzu Motors, Inc.* (2001) 90 CA4th 1094, 1103–1104, 109 CR2d 583.

Motorhome coaches are included within the Song-Beverly Consumer Warranty Act and therefore the ''replace or refund'' provision (CC §1793.2(d)) is applicable. *National R.V., Inc. v Foreman* (1995) 34 CA4th 1072, 1076, 1081, 40 CR2d 672.

When an action is brought under CC §1793.2, the special statute of limitation (four years) of the California Uniform Commercial Code §2–725, which specifically governs actions for breach of warranty in a sales contract, supersedes the general provisions of CCP §338(a) (three years) for liabilities created by statute. *Krieger v Nick Alexander Imports, Inc.* (1991) 234 CA3d 205, 285 CR 717. Moreover, a plaintiff may be entitled to civil penalties under the Song-Beverly Act when the defendant intentionally fails to fulfill his or her responsibilities. To prove that the defendant acted intentionally under the act, the plaintiff need only show that the defendant acted willfully, not that his or her motives were bad. *Ibrahim v*

Ford Motor Co., supra. A violation is willful if the defendant's failure to give a refund or replace the vehicle did not result from a reasonable and good faith belief that a refund or replacement was unnecessary under the statute. *Kwan v Mercedes-Benz of N. Am., Inc.* (1994) 23 CA4th 174, 185, 28 CR2d 371. For example, if the defendant reasonably believed the vehicle conformed to the warranty, the failure to replace or refund would not be willful. *Kwan v Mercedes-Benz of N. Am., Inc., supra.*

The continued use of a car does not entitle the manufacturer to an offset, nor is the right of a buyer to reimbursement or replacement equivalent to a rescission. *Jiagbogu v Mercedes-Benz* (2004) 118 CA4th 1235, 1238, 1242, 1244, 13 CR3d 679.

C. [§5.109] Automotive Consumer Notification Act (CC §§1793.23–1793.24)

Under CC §1793.23, a manufacturer who reacquires a motor vehicle under CC §1793.2(d)(2) must request that the Department of Motor Vehicles inscribe the ownership certificate with the words ''Lemon Law Buyback'' and include a description of the problems giving rise to the reacquisition (see exact requirements for notice in CC §1793.24). In addition, the manufacturer or dealer who sells, leases, or transfers ownership of a motor vehicle, when the ownership certificate contains a ''Lemon Law Buyback'' notice, must obtain written acknowledgment from the retail buyer or lessee of the motor vehicle of the notice. CC §1793.23(e)–(h). There must also be a ''Lemon Law'' decal on the vehicle. See CC §1793.23.

D. Uniform Commercial Code Warranties

1. [§5.110] Statutory Coverage

The Commercial Code imposes some general warranties applicable to consumer transactions. Com C §§2312–2317. These warranties are both express and implied. Com C §§2313–2315. They do not apply to sales of services. The Commercial Code warranties may not be easily disclaimed. Com C §2316. Such disclaimers have sometimes been found unconscionable even in a commercial sales situation. See *A&M Produce Co. v FMC Corp.* (1982) 135 CA3d 473, 186 CR 114; *Dorman v International Harvester Co.* (1975) 46 CA3d 11, 120 CR 516.

2. [§5.111] Express Warranties

Promises made by the seller, specific descriptions made by the seller, or samples or models shown by the seller create express warranties. Com C

§2313. However, in all cases the key to the creation of an *express* warranty is that the seller's statements must become part of the basis of the bargain. *Hauter v Zogarts* (1975) 14 C3d 104, 115, 120 CR 681. A transaction involving monthly receipts as part of a sale of a business does not constitute a sale of goods and consequently does not create an express warranty. *Kazerouni v De Satnick* (1991) 228 CA3d 871, 279 CR 74.

The burden is on the seller to prove nonreliance on a statement actually made by the seller to the buyer during negotiations. *Hauter v Zogarts, supra*. See also Official Comment 3 to UCC §2–313; Comment, *Basis of the Bargain: What Role Reliance*, 34 Pitt L Rev 145 (1972). See also *Keith v Buchanan* (1985) 173 CA3d 13, 220 CR 392 (extensively discusses both express and implied warranties under the Commercial Code).

3. [§5.112] Implied Warranties

When the seller is a merchant of goods of the kind sold, there is an implied warranty of merchantability. Com C §2314(1). See Com C §2314(1)(b); Official Comment 3 to Com C §2314; Comment, *Are There Implied Warranties on Used Cars in California?* 9 USF L Rev 539 (1975). The content of an implied warranty of merchantability, however, will depend on the ''contract description'' of the product. For instance, the fact that the seller has characterized the goods as ''guaranteed'' will have ''particular significance in the case of second-hand sales.'' Official Comment 4 to UCC §2–314. The circumstances surrounding the sale of a used product are therefore relevant in determining whether there is an implied warranty and its content.

In order to be merchantable, a product must be fit for the ordinary purpose for which it is used. Com C §2314(2)(c). For example, a passenger automobile must be ''fit to transport the driver and passengers reasonably safely, efficiently, and comfortably.'' *Massingale v Northwest Cortez, Inc.* (Wash App Ct 1980) 620 P2d 1009. See also *Berg v Stromme* (Wash 1971) 484 P2d 380.

When the seller has reason, at the time of the contract, to know the buyer's particular purpose and that the buyer is relying on the seller's skill or judgment, an implied warranty of fitness is created. Com C §2315; *Metowski v Traid Corp*. (1972) 28 CA3d 332, 341, 104 CR 599. Both of these warranties may be excluded or modified. See §5.113.

4. [§5.113] Disclaimer; Construction

No warranty, express or implied, can be modified or disclaimed unless the seller clearly and explicitly does so at the time of contracting by using

words that communicate that risks fall on the buyer. *Hauter v Zogarts* (1975) 14 C3d 104, 119, 120 CR 681. A warranty disclaimer is subject to the doctrine of unconscionability, which is a question of law to be decided by the court. *U.S. Roofing, Inc. v Credit Alliance Corp.* (1991) 228 CA3d 1431, 1446, 1448, 279 CR 533.

To exclude the implied warranty of merchantability, the language of the disclaimer must mention ''merchantability,'' and to exclude the implied warranty of fitness, the exclusion must be in writing and be conspicuous. Com C §2316(2). Words such as ''as is,'' ''with all faults,'' or ''there are no warranties beyond those described'' are sufficient to disclaim implied warranties if the buyer had an opportunity to inspect the goods before contracting. Com C §2316(3). In addition, an implied warranty of quality may be excluded if the disclaimer is set out conspicuously (*i.e.,* written so that a reasonable person would notice it) and clearly. *Hicks v Superior Court* (2004) 115 CA4th 77, 80, 90, 8 CR2d 703.

Any words of disclaimer or modification of warranty should be strictly construed against the seller. See, *e.g., Hauter v Zogarts, supra,* 14 C3d at 119. See also Com C §2316(1).

A financing lessor may disclaim all warranties provided that the lessee-buyer has an adequate remedy against the manufacturer or supplier for any defect in the equipment. *U.S. Roofing, Inc., supra,* 228 CA3d at 1437.

An ''as is'' clause or other term that purports to disclaim implied warranties will be denied enforceability despite its technical compliance with Com C §2316 if the term is part of a contract of adhesion and, when the term is considered in its context, the court concludes that its enforcement would be unconscionable. CC §1670.5; *A&M Produce Co. v FMC Corp.* (1982) 135 CA3d 473, 186 CR 114. See also *Graham v Scissor-Tail, Inc.* (1981) 28 C3d 807, 171 CR 604.

If the court determines that a contract or contract term is unconscionable, the court under CC §1670.5 may (1) refuse to enforce the contract, (2) enforce the remainder of the contract without the unconscionable term, or (3) limit the application of the unconscionable terms so as to avoid any unconscionable results. See also the discussion of adhesion contracts at §5.2.

The court in *A&M Produce* concluded (135 CA3d at 493): ''When non-negotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability as codified in Uniform Commercial Code sections 2–302 and 2–719, subdivision (3), furnishes legal justification for resisting enforcement of the offense results.''

5. [§5.114] Relief Available

When the goods fail to conform to the warranty the buyer may

- Reject the goods, cancel the contract, and recover all moneys paid to the seller plus incidental and consequential damages (Com C §2711(1)), or
- Retain the goods and recover the difference in value plus incidental and consequential damages (Com C §2714).

The parties by agreement may set a reasonable sum as liquidated damages (Com C §2718; subject to and in compliance with CC §1671) or contractually modify or limit the above remedies (Com C §2719).

When all warranties have been disclaimed, revocation of acceptance is not available even when the equipment proves defective if the equipment otherwise conforms to all pertinent provisions of the lease-sale agreement (*e.g.,* description, terms of delivery). *U.S. Roofing, Inc. v Credit Alliance Corp.* (1991) 228 CA3d 1431, 1437, 279 CR 533. When the implied warranty of merchantibility is breached, the buyer need not give the seller an opportunity to repair the damaged goods. *Mocek v Alfa Leisure, Inc.* (2003) 114 CA4th 402, 404, 7 CR3d 546 (mobile home in this instance).

There are limits on the power of the parties to contractually modify or limit the Commercial Code remedies. When the circumstances cause an exclusive or limited remedy, such as repair or replacement of parts, to ''fail of its essential purposes,'' the standard Commercial Code remedies will apply, including the right to recover damages, or the right to reject or revoke acceptance, cancel, and recover restitution. This exception means that there must be at least a fair quantum of remedies available to the buyer for the seller's breach of warranty. Comment 1 to Uniform Commercial Code §2–719; see *Rose v Chrysler Motors Corp.* (1963) 212 CA2d 755, 28 CR 185.

E. [§5.115] Grey Market Goods (CC §§1797.8–1797.86)

Civil Code §§1797.8–1797.86 were enacted to regulate the sale of grey market goods, defined in CC §1797.8(a) as consumer goods bearing a trademark and normally accompanied by an express written warranty valid in the United States that are imported through channels other than the manufacturer's authorized United States distributor and that are not accompanied by an express written warranty that would be valid in the United States. Regulated sales include leases of more than four months. CC §1797.8(b). Under CC §§1797.81–1797.83, retail sellers of grey market goods are required to make specified disclosures when applicable. For example, the seller must disclose that an item is not covered by a manufac-

turer's express written warranty valid in the United States unless the seller provides an express written warranty that satisfies specified conditions. CC §1797.81(a)(1), (b). A retail seller who violates these provisions is liable to a buyer who returns the product for a refund, or credit on credit purchases, if the product has not been misused according to the printed instructions provided by the seller. CC §1797.85. Violation of these provisions also constitutes unfair competition under Bus & P C §17200, grounds for rescission under CC §1639, and an unfair method of competition or deceptive practice under the Consumers Legal Remedies Act (see §§5.26–5.30). CC §1797.86.

F. [§5.116] Home Roof Warranties

Contracts and warranties for roofing materials used on residential structures, and contracts and warranties for the installation, repair, or replacement of any portion of the roof of a residential structure are regulated by CC §§1797.90–1797.96. The warranty obligations of any contract governed by CC §§1797.90–1797.96 that was entered into on or after January 1, 1994, are directly enforceable by all subsequent purchasers and transferees of the residential structure unless the contract contains a clear and conspicuous provision limiting transfer of the warranty. CC §1797.92. Any provision limiting transferability of the warranty must meet the requirements set forth in CC §1797.94.

G. [§5.117] Home Improvement Warranties

Even though not a ''sale of goods,'' contracts involving labor and materials to make home improvements give rise to an implied warranty of merchantability. See *Aced v Hobbs-Sesack Plumbing Co.* (1961) 55 C2d 573, 582, 12 CR 257, 262.

XI. SOLICITATION AND ADVERTISING

A. Home Solicitation Contracts (Three-Day Rescission) (CC §§1689.5–1689.15)

1. [§5.118] Statutory Coverage

Civil Code §§1689.5–1689.15 apply to contracts for goods or services made at other than ''appropriate trade premises'' in an amount of $25 or more, including interest and service charges. CC §1689.5(a). They do not apply to